Supreme Court, U.S.
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No. 96-1962

In the
Supreme Court of the United States
October Term, 1996

Sylvia Cohen,

Petitioner,

v.

Little Six, Inc., d/b/a Mystic Lake Casino,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF REPLY

In its brief in opposition, Respondent obliquely raises an issue which itself justifies granting the writ of certiorari. That issue: the question of state action arising from Congressional regulation of the internal affairs of Indian tribes. If extensive Congressional involvement in Indian affairs constitutes state action, then the nature and extent of tribal sovereign immunity is subject to equal protection analysis. *Cf. Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 177-79 (1972) (regulation involving internal private rules was state action violating equal protection clause). As a consequence, Respondent's primary objection to granting the writ of certiorari -- the inherent origin of tribal sovereignty -- misses the point.

I. CONGRESSIONAL SANCTION AND/OR AUTHORIZATION OF TRIBAL ACTS CONSTITUTES STATE ACTION

The relevant question for equal protection purposes is whether Congressional involvement in tribal affairs constitutes state action, not whether Congress is the source of tribal sovereign immunity *per se*. Respondent's brief in opposition shoots wide of the mark by focusing exclusively on the origins of tribal sovereignty.

The flaw in Respondent's reasoning is apparent in the very language of its argument:

> Even if Petitioner were to argue that adopting a constitution under provisions of the Indian Reorganization Act, 25 U.S.C. § 476, constitutes federal action creating a race based preference, such argument could not pass muster. "While the exercise of powers under these constitutions was expressly sanctioned by Congress, the tribes adopting them

> continue to exercise their unextinguished powers of sovereignty and not statutorily delegated powers."

Brief in Opposition, at 14-15 n. 9 (emphasis added) (citation omitted). Respondent thus concedes that the exercise of these powers has been "expressly sanctioned by Congress." That express sanction constitutes state action subject to equal protection analysis, regardless whether such powers are characterized as inherent or delegated.

Congressional involvement in Indian tribal affairs is more than mere sanction. The purpose and effect of Congressional action is to restore Indian tribal self-determination, necessarily including their exercise of sovereign immunity. *See, e.g, Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973) (the intent and purpose of the Indian Reorganization Act of 1934 ("IRA") was to give Indian tribes the chance to restore initiative destroyed by a century of oppression and paternalism); *Cheyenne River Sioux Tribe v. Andrus,* 566 F.2d 1085, 1086 (8th Cir.), *cert. den.*, 439 U.S. 820 (1977) (Purpose of the IRA is to encourage Indians to revitalize their self-government).

Congress has explicitly acknowledged that federal action is necessary prerequisite to tribal self-determination. In 1975, Congress enacted a statute which included the following formal finding of fact:

> The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that ---
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full

> opportunity to develop leadership skills crucial to the realization of self-government . . .

25 U.S.C. § 450(a) and (a)(1) (the Indian Self-Determination and Education Assistance Act) (emphasis added). In other words, Congress determined that Indian tribes require federal assistance in order to realize true self-government, because "prolonged Federal domination" of Indian tribes has prevented its exercise.

Under analogous circumstances, this Court has found the presence of state action. In *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 724-725 (1961), the Court held state action existed because the government leased public property to a private business which engaged in discriminatory activity. *Burton* applies with particular force to the present case: state action is present because title to all Indian lands is held in the name of the United States. *See* 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to . . . this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired . . . "); *see also, e.g., Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667 (1974) (". . . fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nation and later the original States and the United States . . ."); *Holt v. C.I.R.,* 364 F.2d 38, 41 (8th Cir. 1966) (Indian tribal land is held in trust by the United States for the use of the tribe).

This Court's decision in *Moose Lodge No. 107 v. Irvis, supra,* under similar facts, also demonstrates the existence of state action. *Moose Lodge* held generally that government regulation of private conduct in and of itself does not rise to state action. *Id.,* 407 U.S. at 176-77. However, state action is present when regulations require the private actor to follow its discriminatory internal rules and by-laws. *Id.,* at 178-79. Likewise, the tribal exercise of sovereign immunity necessarily

involves state action, given the breadth and depth of Federal involvement in internal tribal affairs. Congress significantly regulates both the procedures for adopting tribal constitutions as well as their content. *See* 25 U.S.C. § 476(a)-(e); 25 C.F.R. § 81.1, *et seq.* (extensive procedural and substantive requirements for adoption of tribal constitutions and bylaws). Federal involvement extends to the *a priori* question of a tribe's very existence: the Federal government will not recognize an Indian tribe unless it complies with a complex set of regulations. *See* 25 C.F.R. § 83.1, *et seq.*

As part of a statutory scheme designed to promote Indian self-determination, Congress has sanctioned and authorized racially discriminatory acts. Such action by Congress constitutes state action, and should be reviewed by this Court.

II. THE HISTORIC ORIGIN OF TRIBAL SOVEREIGN IMMUNITY IS IRRELEVANT TO PETITIONER'S ARGUMENT

Respondent's vigorous defense of the extra-Congressional origins of tribal sovereignty is beside the point: it is the Congressional decision to restrict tribal sovereign immunity in some areas while permitting in others which is subject to equal protection analysis, and not the tribes' exercise of sovereign immunity *per se.* Thus solely for purposes of equal protection analysis tribal sovereign immunity exists "by virtue" of congressional action.

Title 25 of the United States Code, and regulations promulgated thereunder, discussed above, undermine Respondent's argument. Respondent presumes Congress has used its plenary power over Indian tribes *a la carté* -- enacting limitations on tribal sovereignty here and there, with no overall goal or purpose. However, the quantity and specificity of the statutes and regulations governing Indian affairs demonstrate that tribal powers, while perhaps not delegated as such by

Congress, exist because of an affirmative Congressional choice implementing a comprehensive statutory scheme.

Congress cannot exercise its plenary power to occupy the field of Indian affairs in a manner which discriminates on the basis of race, even if the discriminatory acts do not flow from Congressional action. The following hypothetical may illustrate the point. Suppose that certain non-governmental actors were engaging in acts amounting to racial discrimination under the "color of law." In response, Congress enacted a statute, pursuant to its power to enforce the Fourteenth Amendment, prohibiting those acts, but that this hypothetical statute applied, by racially explicit terms, only to discrimination against African-Americans. In this hypothetical situation, strict scrutiny equal protection analysis would apply because Congress used racial classifications in the exercise of its plenary power to enforce the Fourteenth Amendment, extending legal protections to African-Americans unavailable to members of any other race. The fact that Congress was not the legal source for discriminatory acts "under color of law" is irrelevant to the equal protection analysis.

Likewise Respondent's focus on the inherent nature of tribal sovereign immunity is a red herring: the proper question is whether Congress, in the exercise of its plenary authority over Indian affairs, has adopted, authorized, or sanctioned racial discrimination by Indian tribes. This important question, wholly ignored by Respondent, alone justifies granting the writ of certiorari.

III. APPLICATION OF STRICT SCRUTINY WILL NOT REDUCE INDIAN TRIBES TO "PRIVATE, VOLUNTARY" ASSOCIATIONS.

Adarand's admonition that application of strict scrutiny should not automatically invalidate a challenged federal action

may apply with particular force to Indian tribes -- the constitutional status of Congress' plenary power over Indian affairs may well, for the sake of argument, reflect a compelling governmental purpose. *Adarand Constructors, Inc. vs. Pena*, 515 U.S. 200, 237 (1995) ("Finally we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). This alone eliminates a primary argument used in *Mancari* to avoid application of a higher level of scrutiny: Title 25 of the U.S. Code would not be struck down in its entirety. *See Morton v. Mancari*, 417 U.S. 535, 552-553 (1974) ("If these laws...were deemed invidious racial discrimination, an entire title of the United States Code (25 U.S.C.) would be effectively erased...").

But a compelling governmental purpose is only half of the constitutional equation: it remains to be seen whether Congressional action is narrowly tailored to serve that compelling interest. There may be situations in which the exercise of tribal sovereign immunity might, in fact, be so narrowly tailored. However, use of tribal sovereign immunity to defend an immensely profitable casino is certainly not such a case.

In any event, it is a poor "slippery slope" argument to assert that "Petitioner seeks to have this Court treat Indian tribes as little more than private voluntary organizations." Brief in Opposition at 8. Respondent confuses sovereignty with sovereign immunity, and compounds the error by ignoring the commercial, not governmental, use of sovereign immunity in this case. This Court is quite capable of drawing legal distinctions necessary to avoid Respondent's parade of horribles.

IV. PETITIONER'S LEGAL ISSUES WERE PROPERLY RAISED BELOW

As a matter of state law the Minnesota Supreme Court has rejected Respondent's claim that the issues were not properly raised below. After Petitioner filed her Petition for Review in the Minnesota Supreme Court, Respondent filed a Motion to Strike, contending that the constitutional claims had not properly been raised previously. Respondent's Motion to Strike at 1-2. The Minnesota Supreme Court denied Respondent's Motion without comment, and granted the Petition for Review without any condition or limitation on the issues to be raised. Order Granting Review, April 12, 1996.

Minnesota law contains an unusually broad grant of appellate jurisdiction, providing ample justification for the conclusion that the Petitioner's issues were properly raised below. Minnesota appellate courts possess the inherent power to analyze any matter on appeal "as the interest of justice may require." Rule 103.04, MINN. R. CIV. APP. P. *See also McCormack v. Hankscraft Co.*, 278 Minn. 322, 154 N.W.2d 488, 502-03 (1967) ("[W]e may, in our discretion, 'review any other matter as the interests of justice require.'"). The Minnesota Supreme Court has the power to review important constitutional issues despite procedural defects, including the power to consider constitutional claims for the first time.[1]

This Court does not have the power to review a decision by a Minnesota court exercising its appellate jurisdiction under

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[1] *See Specialized Tours, Inc. v. Hagen,* 392 N.W.2d 520, 536 n.15 (Minn. 1986) ("the constitutional issue was briefed by both parties and is an issue of public importance. We have taken jurisdiction despite procedural flaws when we consider an issue of public importance."); *Tischendorf v. Tischendorf,* 321 N.W.2d 405, 410 (Minn. 1982), *cert. den.*, 460 U.S. 1037 (1983) (constitutional issues may be raised for the first time on appeal in Minnesota courts when failure to review the issue may work an injustice or infringe upon a constitutional right).

Minnesota law. If a state court of last resort has already ruled the issues were properly raised, then this Court cannot review such a decision if it is based on an adequate and independent state ground. *See, e.g., International Longshoreman's A'ssn, AFL-CIO v. Davis,* 476 U.S. 380, 387 (1986) (" . . . we have no authority to review state determinations of purely state law."). Although the order of the Minnesota Supreme Court does not establish the grounds of the decision, the arguments and briefs of the parties on the issue were overwhelmingly based on Minnesota law, creating a strong presumption that the decision was based on Minnesota law. *See* Motion to Strike (citing Minnesota law); Petitioner's Response to Motion to Strike (citing Minnesota law).

The fact that the Minnesota Supreme Court did not pass upon Petitioner's constitutional arguments does not bar consideration in this Court, because they were pressed, albeit unsuccessfully. This Court has held:

> Our traditional rule . . . precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." . . . That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions.

United States v. Williams, 504 U.S. 36, 41 (1992) (emphasis added, citations omitted). This Court has previously addressed fundamental constitutional issues ignored by a state court of last resort. *See, e.g., Kansas v. Hendricks,* ___ U.S. ___ (1997) (slip opinion at 8) (considering constitutional

issues pressed by petitioner, but not passed upon by the Kansas Supreme Court).[2]

The deliberate decision of the Minnesota Supreme Court to accept review of all issues raised by Petitioner, combined with its failure to decide all such issues, while anomalous, is no bar to this Court's consideration.

V. CONCLUSION

The present case squarely presents a contradiction in constitutional principle: while the Constitution forbids the government from acting on the basis of racial classifications (except in the most compelling and narrow circumstances), it grants Congress plenary power to regulate the affairs of a specific group of persons, defined explicitly on the basis of their race. This contradiction cuts to the heart of the phrase "equal protection of the laws" and deserves thorough consideration by this Court.

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[2] This rule also allows consideration of issues raised by the remarkable dissenting opinion of Judge R.A. Randall, in the Minnesota Court of Appeals. Judge Randall pressed a broad range of issues in his dissent, including racial discrimination and equal protection, which the majority in the Minnesota Court of Appeals did not pass upon. *See, e.g.*, Appendix to Petition for Writ of Certiorari, at A-62 to A-63 (Randall, J., dissenting) (explicitly rejecting *Morton v. Mancari*, 417 U.S. 535 (1974)).

SEPTEMBER 8, 1997 Respectfully Submitted,

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